IN THE

Supreme Court of the United States.

OCTOBER TERM, 1921.

No. [redacted]59

IN THE MATTER OF MARCUSE & COMPANY,
ALLEGED BANKRUPTS.

C. B. GILES, ET AL.,
Petitioners,
vs.
HENRY VETTE, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT.

BRIEF OF RESPONDENTS, FRANK A. HECHT, JR., AND CLARA K. HECHT, AS EXECUTORS OF THE WILL OF FRANK A. HECHT, DECEASED, AND OF JOSEPH M. FINN, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

HORACE KENT TENNEY,
HARRY A. PARKIN,
Attorneys for the Executors of Frank A. Hecht.

CARL MEYER,
HENRY RUSSELL PLATT,
Attorneys for Joseph M. Finn.

GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

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STATEMENT OF FACTS.

We cannot accept the statement of facts submitted by petitioners. We will briefly detail the relevant proven facts.

Ben Marcuse, who had been an employee of a former brokerage concern in the City of Chicago, executed on April 2, 1917, a limited partnership agreement between

himself and Lew H. Morris as general partners, and the other respondents as limited partners. (Rec., 340, 413.) This special partnership agreement was signed and nine duplicate originals were left in escrow and were not to be delivered or become effective until certain court proceedings involving the former brokerage concern were dismissed and certain arrangements made with the executors of the estate which owned it. (Rec., 478.)

Between the date of the execution of this special partnership agreement and the carrying into effect of the foregoing details, the New York Stock Exchange advised Marcuse that no limited partnership with more than two limited partners would be admitted to the exchange. (Rec., 405.) It was also required that the limited partners must not be engaged in any other business. The proposed limited partnership as outlined in the contract of April 2nd could not, therefore, be carried out and the documents left in escrow evidencing the agreement were never delivered.

Thereafter Marcuse and his counsel sought to organize a limited partnership with only two limited partners, and induced respondents Hecht and Finn to become limited partners in the new firm of Marcuse & Company. (Rec., 490-492.) On June 30, 1917, an agreement was made whereby the firm of Marcuse & Company was organized with Marcuse and Morris as general partners and Hecht and Finn as limited partners, representing themselves and all of the other respondents to this petition, Vette, Zuncker, Regensteiner and the Studebakers (the latter through the Studebaker Trust, controlled by them). All contributed the same amounts of money which they had agreed to contribute under the limited partnership agreement of April 2, 1917. The Hecht-Finn trust agreement was executed, whereby all of the

respondents appointed the Chicago Title and Trust Company as trustee to receive all of the profits. The special partners, Hecht and Finn, also executed the agreement as trustees. The trust company was to issue certificates to each of the parties who had contributed the funds for the special partners, such certificates to be given to each contributor in proportion to his contribution.

Certificates were issued to Hecht and Finn for 50 and 63 shares, respectively, to one Hoffman, representing the Studebakers, for 100 shares; to Regensteiner, 57 shares; to Vette, 60 shares, and to Zuncker, 50 shares. (Rec., 370, 395, 498.) The total amount paid in by the respondents was $190,000, contributed in proportion as the certificates were issued.

This was on Saturday, June 30, 1917. Marcuse, Morris, Hecht and Finn executed a certificate required under the Limited Partnership Act then in force in Illinois. This was to be filed with the county clerk. Saturday afternoon was a legal holiday in Illinois and the county clerk's office was closed at noon so the certificate could not be filed until the following Monday, July 2nd. (Rec., 364.)

This certificate complied with the provisions of the existing Limited Partnership Act on June 30, 1917. Marcuse and Morris were named as general partners and Hecht and Finn as limited partners. (Rec., 361.) On Monday, July 2, 1917, the first business day following, the certificate was filed and the firm of Marcuse & Company began business. (Rec., 535.) Hecht and Finn were never held out as anything but limited partners. They were so designated on the firm's stationery and business cards. (Rec., 732-734.) No creditor ever claimed to have dealt with the firm upon the theory that Hecht

and Finn were other than limited partners. They took no part in the business and did not assume to be other than limited partners. No claim was ever made by any creditor that he traded with the firm upon the belief that Hecht and Finn were general partners. The business continued until the petition in bankruptcy was filed, practically three years later (March 11, 1920). (Rec., 43-46.)

On June 28, 1917, two days before the execution of the limited partnership agreement, there was passed by the Illinois Legislature a new general partnership statute and a new limited partnership statute, being the Uniform Acts recommended by the American Bar Association. These acts became effective on July 1, 1917, which was Sunday. Thus the old statute was in force on Saturday when the limited partnership contract and the Hecht-Finn trust agreement were executed, and if the certificate had been filed with the county clerk on Saturday, there would have been no question of its full compliance with the statute. It was not until the filing of the petition in bankruptcy that any of the respondents knew or had had suggested to them in any way, that they were possibly liable as general rather than as limited partners. (Rec., 407-409, 889-891.)

All of the respondents believed that the limited partnership certificate had been properly filed.

Section 11 of the Uniform Limited Partnership Act of July 1, 1917, provides as follows:

"A person who has contributed to the capital of a business conducted by a person or partnership erroneously believing that he has become a limited partner in a limited partnership, is not, by reason of his exercise of the rights of a limited partner, a general partner with the person or in the partnership carrying on the business, or bound by the obligations of such person or partnership; provided

> that on ascertaining the mistake he promptly renounces his interest in the profits of the business, or other compensation by way of income." (Hurd's Revised Statutes 1917, Chapt. 106a, sec. 55.)

When, therefore, after the filing of the petition in bankruptcy the assertion of the claim that they were liable as general partners was first made, Hecht and Finn promptly renounced their interest in the profits of the business by way of income and tendered and paid to the court $46,000, being all the profits which they and all the other respondents had received from the partnership with interest thereon. (Rec., 891, 892.)

On the hearing before Judge Landis he held (Rec., 333) that the firm of Marcuse & Company was composed of all of the respondents by reason of the failure to file the limited partnership agreement on Saturday instead of Monday morning, as was done, and referred the matter to the referee to determine the question of solvency of these respondents as general partners.

From this finding a petition to review and revise was filed in the Circuit Court of Appeals for the Seventh Circuit and that court, after elaborate arguments, held in substance as follows:

1. That Hecht and Finn in good faith believed themselves to be limited partners in a limited partnership.

2. That having such belief their prompt renunciation and payment of their profits into court relieved them from liability by reason of Section 11 above quoted.

3. That in addition, even if this were not true, the Uniform General Partnership Act prevented them from becoming liable as general partners.

4. That Hecht and Finn not being liable as general partners and having tendered all of the profits, not only

of themselves but of all the other respondents into court, the other respondents were likewise relieved from liability.

From the foregoing it is clear that:

(1) The case involves no federal question by any possible reasoning. The very reason which actuated the American Bar Association to bring about the enactment of the statutes in question was that these uniform laws cover matters entirely outside of federal laws and are exclusively matters of state statutes. For if they involved a federal matter, the desired uniformity could be secured by congressional legislation.

(2) The decision of the Court of Appeals is correct.

(3) The fact that there was a dissenting opinion in the Court of Appeals does not in anywise form the basis for the allowance of the writ.

(4) The fact that the amount involved in the bankruptcy case was large furnishes no ground for certiorari. If the contrary were true, this court would be engaged in hearing nothing but certiorari because most federal cases involve large sums of money.

(5) Nor does the fact that the litigation arose in a bankruptcy proceeding make the question a federal one. The rights of creditors and debtors under these partnership laws depend upon state statutes and the bankruptcy courts enforce these rights according to the varying state laws which govern them.

I.

THE DECISION OF THE COURT OF APPEALS IS SOUND. EVEN IF IT WERE NOT, THE RECORD PRESENTS NO QUESTION CALLING FOR THE ISSUANCE OF A WRIT OF CERTIORARI.

The decision of the Court of Appeals is sound, as hereafter argued. But, aside from that, this case presents no question of general importance sufficient to warrant the issuance of the writ here sought, nor is there involved any question of lack of uniformity of decision. No claim is made by petitioners that it does. There is no decision by any Circuit Court of Appeals or any state court contrary to the decision here sought to be reviewed. There is not, therefore, any question of conflict of decisions. The sole basis for the petition is that petitioners disagree with the decision of the Circuit Court of Appeals and, as they state (Petition, p. 22), they desire in "the public interest" which, obviously, is nothing but petitioners' own interest, "an authoritative ruling on these most important uniform acts—a ruling that will inspire confidence and preserve the uniformity aimed at." In other words, petitioners do not ask this court to decide as between conflicting decisions, but desire this court *to make an original decision as a guide to the state courts hereafter.* Such a ruling would be persuasive but neither controlling nor within the meaning of the act authorizing *certiorari*, and the uniform practice of this court thereunder.

None of the other reasons assigned in support of the petition, the asserted "palpable error in the decision of the Circuit Court of Appeals" and the amount involved, brings the case within those questions which must be involved to warrant the issuance of the writ.

The rule is well stated in *Forsyth* v. *Hammond*, 165 U. S. 506, 514:

> "It is a power which will be sparingly exercised, and only when circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal or between courts of appeal and the courts of a state, or some matter affecting the interests of this nation in its internal or external relations demands such exercise."

The argument that the amount involved justifies the issuance of the writ is answered by this court in the following:

> "However important the case may be to the applicant, the question involved is not one of gravity and general importance. There is no conflict between the decision of state and federal courts or between those of federal courts of different circuits. There is nothing affecting the relations of this nation to foreign nations, and indeed no matter of general interest to the public."
>
> *Fields* v. *U. S.* 205 U. S. 292, 296.

If this court should take this case it would be called upon to decide matters applicable solely to the State of Illinois. The very reason for the action of the American Bar Association in securing uniform state laws is that the matter lies outside of federal law and is exclusively a question of state statute.

Notwithstanding the position of petitioners, the decision complained of is the proper decision under the facts involved in this particular case, and any future cases, under similar facts will, we are confident, be followed by both state and federal courts in construing the acts of the Legislature of Illinois, which are involved herein.

The whole case of petitioners hinged upon the effect attributed by Judge Landis to a purely accidental circum-

stance. Under the Limited Partnership Act of Illinois, in force prior to July 1, 1917, it was permissible for limited partnerships to engage in the brokerage business. On June 28, 1917, the new Uniform Limited Partnership Act was passed, becoming effective on July 1st. Respondents had, prior to June 30th, agreed to form a limited partnership, and on June 30, 1917, finally signed and formally executed the necessary papers. This was Saturday, a legal half-holiday in Illinois. The recorder's office was closed at noon. On Monday July 2nd, the first business day after the execution of the document, without knowledge of the change in the law which occurred on Sunday morning, the lawyer filed the certificate. The session laws of Illinois are not published or put in form for general use until a considerable period after the close of the legislative session and, except by personal inquiry at the state capital for a particular act, the public and even the bar have no opportunity to inform themselves of the passage of acts which do not happen to be discussed in the newspapers. Because of this failure to file the certificate on Saturday afternoon, Judge Landis, who heard the case, held the respondents to be general partners, and as such liable for all of the firm's obligations. As he said, his reason was:

> "the failure to comply with the Illinois statute specifying the steps, and promoting the route to be taken to constitute a limited partnership." (Rec., 934.)

As he again stated upon another occasion:

> "If we (petitioners) can edge in here and get our money it will be because these gentlemen (respondents) slipped." (Rec., 490.)

Meaning thereby that they had failed to file the papers on June 30th, instead of on July 2nd.

It is thus seen that the basis for holding respondents liable was a purely technical one, devoid of any of the

elements of justice, and of intention on the part of the respondents, and in fact, absolutely at variance with their clearly expressed intention. It was a unique situation, impossible of recurrence, and therefore presenting questions which will not again arise.

The Circuit Court of Appeals disagreed with Judge Landis in holding defendants on this narrow, technical ground, and held that by Section 11 of the Uniform Limited Partnership Act of July 1, 1917 (quoted in full, *supra*), these respondents, actually believing that they had become limited partners, and having renounced and restored all of the money which not only they, but all of the other respondents here, had obtained as profits from the business, had thereby freed themselves from any liability as general partners in said business.

The decision of the Court of Appeals, in effect, therefore, is not merely a construction of the Uniform Limited Partnership Act, but a determination of the effect of one provision of that act upon the Illinois Limited Partnership Act as applied to certain particular facts.

It should also be carefully noted that the failure to file the certificate on Saturday afternoon of June 30th, cannot, under any conceivable set of circumstances, furnish the basis for any uniform construction of the Limited Partnership Act. It is unique to the State of Illinois and can never occur again because the Illinois Act of 1874 was not a uniform law, and the failure to file on Saturday was a coincidence that will never be repeated. Therefore possible future conflict between the decisions of the courts, cannot possibly arise.

Petitioners' entire case is based upon a strict, narrow, technical construction of a statute recommended by the American Bar Association as a means of avoiding the harshness of the former decisions with respect to limited

partnerships and passed by the State of Illinois with that express intention. To sustain this writ would be to undo all that those interested in reforming the law so that it will coincide with an enlightened conception of business fairness have for years been doing to modify the stringent rules heretofore applied to limited partnerships.

Petitioners' suggestion (page 18) that the interests of jurisprudence demand that this court take jurisdiction to determine the proper construction to be placed upon the Uniform Limited Partnership Act, is without merit. An interpretation of the act by this court would be nothing more than its construction of the Illinois statute, and while it, of course, would be of great persuasive influence, it would not, as a matter of law, be binding upon the courts of Illinois, or of any other state which has adopted that act. It would be immaterial (though it is not the fact) if different states placed different constructions upon the statute. This was decided in *May* v. *Tenney*, 148 U. S. 60, 64, where this court said:

> "The fact that similar statutes are allowed different effects in different states is immaterial. As observed by Mr. Justice Field, speaking for this court, 'The interpretation within the jurisdiction of one state becomes a part of the law of that state, as much so as if incorporated into the body of it by the legislature. If, therefore, different interpretations are given in different states to a similar local law, that law in effect becomes by the interpretations, so far as it is a rule for our action, a different law in one state from what it is in the other.' *Christy* v. *Pridgeon*, 4 Wall. 196, 203. See, also, *Detroit* v. *Osborne*, 125 U. S. 492."

In *Shelby* v. *Guy*, 11 Wheat. 361, 367, the court laid down the same doctrine, although, as the court said:

"It is obvious that this admission may, at times,

> involve us in seeming inconsistencies; as, where states have adopted the same statutes, and their courts differ in the construction."

Furthermore, this court, notwithstanding any interpretation which it might now give the act, would be required to follow any subsequent contrary ruling by the Supreme Court of Illinois in a case thereafter arising.

Wade v. *Traviss County*, 174 U. S. 499, 508.
Fairfield v. *County of Gallatin*, 100 U. S. 47.
Green v. *Neal's Lessee*, 6 Peters, 291.

This court's decision might, therefore, destroy, rather than create the uniformity petitioners claim they seek and make a rule for the federal courts which could not be enforced against suitors in the state courts, if the Supreme Court of Illinois should disagree with this court in some later decision.

Any decision of this court now made in this case is subject to being overruled by a later case involving the same issues decided adversely by the Supreme Court of Illinois and this court would then be required to overrule its first decision, as was done in *Green* v. *Neal's Lessee, supra.*

> "In *Green* v. *Neal's Lessee*, 6 Pet. 291, a construction given by the Supreme Court of Tennessee to the statute of limitations of that state having been overruled, this court followed the later case, although it had previously adopted the rule laid down in the overruled case."

Wade v. *Traviss County*, 174 U. S. 499, 508.

The fact that there was a dissenting opinion in the Court of Appeals does not create a conflict in opinion. As this court said:

> "Such division, although a close one, does not prevent the opinion of the majority from becoming

the decision of the court, and as such conclusive upon us."

Williams v. *Eggleston,* 170 U. S. 304, 311.

And the dissenting opinion, starting out with the inquiry as to whether there was *any* evidence to sustain the finding of the court below and advocating a narrow and reactionary construction of a statute, remedial in its nature, does not raise any questions of public interest which are not satisfactorily answered in the majority opinion.

No real or substantial grounds for the issuance of the writ have been presented.

From the foregoing it sufficiently appears that an allowance of the writ in cases similar to the case at bar would, in effect, be entirely contrary to the spirit of the act conferring jurisdiction upon this court to grant the writ here sought and that this court should, therefore, not entertain the petition, irrespective of the question as to whether the Court of Appeals decided correctly.

II.

THE PETITION FOR CERTIORARI SHOULD ALSO BE DENIED BECAUSE THE DECISION OF THE COURT OF APPEALS IS CORRECT. RESPONDENTS ERRONEOUSLY BELIEVED THAT THEY HAD BECOME LIMITED PARTNERS AND BY COMPLYING WITH SECTION 11 OF THE LIMITED PARTNERSHIP ACT OF 1917 THEY WERE ABSOLVED FROM LIABILITY AS GENERAL PARTNERS.

Petitioners contend that Section 11 of the Act of July, 1917, does not apply to limited partnerships formed under the Act of 1874 and affords no relief whatever to any person who may have, in good faith, attempted to organize and who believed he had organized, a limited partnership under the prior act. In other words, that Section 11

affords no relief to any special partnership except such as had been formed subsequent to July 1, 1917. This limitation cannot be found in the wording of the statute itself nor in reasonable construction of it.

Reference is made by petitioners to the definition in Section 2 of the Act of July, 1917, defining limited partnerships; and it is asserted that this definition limits the effect of Section 11 to such as had been formed under the new act. A good test of the theory of petitioners may be found in applying their proposal to the situation if these respondents had organized a grain business under the Act of 1874 by complying as they believed with all its provisions; and thus having formed a limited partnership in which they believed they were limited partners it was discovered subsequent to July 1, 1917, that some defect in filing the certificate, or other technicality cast doubt upon the legality of the limited partnership. Upon petitioners' theory these respondents, although admittedly innocent, and honestly believing that they were members of a limited partnership, could not obtain protection from liability after July 1, 1917, because they were afforded none under the Act of 1874. There would then be created a situation where, for the very identical mistakes, which had been made, those who had been fortunate enough to make their mistake after July 1, 1917, could obtain absolute immunity, whereas those who had organized on June 30th, could obtain no such relief but would be held liable as general partners. Such a construction is wholly at variance both with the letter and spirit of the Amendatory Act. If petitioners' argument be true, it is inconceivable that the legislature acted pursuant to the recommendation of the American Bar Association Committee report, which said:

> "The committee is of opinion that the act as drafted preserves all the commercial advantages

> of the present Limited Partnership Act *and does away with the very serious disadvantages* which arise from regarding a person who has contributed to the capital of a partnership as a partner to be held unlimitably liable for all partnership debts, unless he has strictly complied with the requirements of the statute." (Proceedings 26th Annual Meeting National Conference Commissioners on Uniform State Laws, Chicago, Illinois, August 23-29, 1916, p. 226.)

What the legislature was attempting to do was to do away with the "serious disadvantages" of the old act. It was not attempting to make a law having the characteristics attributed to it by petitioners.

Petitioners further rely upon the fact that Section 30 of the Amendatory Act says that limited partnerships formed under any statute prior to the Amendatory Act "shall continue to be governed by the provisions of that act." But that provision refers only to an *actual* limited partnership organized under the old act in a lawful manner and does not apply to a situation such as is here involved, where the partners *erroneously believed* that they had organized a limited partnership, but in which they had not literally followed the statute.

The new act was drawn with the intention of covering a situation exactly such as is involved in this case. Under the old law no relief could have been afforded. Under the new act, with the liberal provisions of Section 11, if the supposed limited partners believed they had organized a limited partnership, but later found they were mistaken, they are afforded the opportunity of refunding such income and profits as they had received from the supposed limited partnership and are granted in exchange therefor a release of general liability.

Such construction is in entire agreement with the in-

tention of the Commissioners submitting the Uniform Limited Partnership Act to the Illinois legislature.

Section 11 does not moreover, refer merely to a mistake of fact. It is extremely broad and covers either a mistake of law or fact. A simple reading of its wording at once discloses that fact. One can be mistaken as to law as well as to fact, or as to mixed questions of law and fact, and the new act was thus drawn in order to control either situation. That is the rule even in construing contracts as stated by this court:

> "It is well settled that courts of equity will reform a written contract where, owing to mutual mistake, the language used therein did not fully or accurately express the agreement and intention of the parties. The fact that interpretation or construction of a contract presents a question of law and that therefore the mistake was one of law is not a bar to granting relief."
>
> *Philippine Sugar Estate Development Co.* v. *Govt. of Philippine Islands*, 247 U. S. 385, 389.

Nor does the fact that the Illinois law of July, 1917, did not authorize limited partnerships in the brokerage business support petitioners' theory that Section 11 does not apply to limited partnerships attempted to be organized under the old law. The act is not so limited in word or intention, and there are no provisions throughout the entire act which indicate that those who had expected to form, and "erroneously believed" they had formed, a limited partnership in the brokerage business would be excluded from the benefits of Section 11, while those who thought they had formed a partnership for the lumber trade would be included. The spirit of the law is opposed to such contention. Limited partnerships in

the brokerage business were permissible under the Act of 1874 and could continue after the new act became effective.

Nor is the effect of "erroneous belief" under Section 11 changed by the question of falsity in a certificate. False certificates are covered by another Section and have their appropriate penalty. However, no false certificate was involved in this case, and the argument from such a premise must fail as it is not applicable to the facts herein as neither the District Court nor the Court of Appeals found or intimated the existence of fraud by respondents.

Hecht and Finn together had contributed $190,000, made up of their own and the contributions from the other respondents, to the going business which, beginning on July 2, 1917, was conducted as Marcuse & Company. (Rec., 362, 706.) There can be no doubt that they "believed" that they were "limited partners in a limited partnership." The certificate filed in accordance with law with the county clerk so recited, and this gave public notice (Rec., 362, 365) as did also the notices which they caused to be published. (Rec., 731.) They so held themselves out to the public and to the customers of the firm, on cards, letterheads and many other ways (Rec., 516, 734), so that everybody clearly understood what respondents believed and what all supposed, their *status* in the firm of Marcuse & Company to be. No one has asserted to the contrary. The District Court so held and counsel for these petitioners so admitted, for during the hearing before Judge Landis the court asked counsel for the petitioners:

> "The Court: Is there any question about that being the then frame of mind?
>
> Mr. Jacobson: No, your Honor." (Rec., 490.)

These respondents did not attempt to exercise any of the rights of general partners. There was no attempt to show that they did. (Rec., 520-524, 601-604.)

The filing of the petition in bankruptcy was the first notice that these respondents had that there was any claim asserted that they were other than limited partners. As soon as they discovered the defect in the limited partnership agreement they promptly tendered to the court through the receiver of the bankrupt firm, $46,-000 in cash, which more than covered all of the moneys which the bankrupt firm had paid to them and all the other respondents as profits, and in addition thereto interest on the amount and an additional sum for safety, together with a formal renunciation of all profits, rights or claims in the partnership or its property. (Rec., 889-892.) This money was taken by the clerk of the District Court. (Rec., 105.)

The language of Section 11 is novel in the law of partnership and clearly covers the facts involved herein. These respondents had contributed to the capital of a business and "erroneously believed that they were limited partners in a limited partnership." When they discovered their belief was erroneous they followed the statutory provision of preventing themselves from becoming liable as general partners.

A review of the history and purposes of the act of which Section 11 is a part, merely reinforces the plain language of the statute.

The American Bar Association, pursuant to its purpose to have *uniform* statutes throughout the Union procured the various states to appoint a "Commission for the Uniformity of Legislation in the United States."

Pursuant to this plan, the Illinois Legislature passed an act in 1917, creating a commission for this purpos

"The National Conference of Commissioners on Uniform State Laws," held its twenty-sixth meeting at Chicago on August 23-29, 1916. At this meeting the committee reported the text of the "Uniform Limited Partnership Act" with an "explanatory note" setting forth the objects and purposes of the proposed act. (Proceedings of the 26th Annual Meeting of the National Conference of Commissioners on Uniform State Laws, held at Chicago, Illinois, August 23-29, 1916, p. 384.)

The National Conference at the same session, also approved the report of the Committee on Commercial Law, which contains the following:

> "The committee is of opinion that the act as drafted preserves all the commercial advantages of the present Limited Partnership Acts and does away with the very serious disadvantages which arise from regarding a person who has contributed to the capital of the partnership as a partner to be held unlimitedly liable for all partnership debts, unless he has strictly complied with the requirements of the statute."

The proposed statute and the "explanatory note" were printed and bound together and in this form placed at the disposal of the members of the Illinois Legislature. The statute was accordingly enacted by the Legislature of Illinois in the form recommended and became effective on July 1, 1917. (Hurd's Revised Statutes of Illinois, 1917, Ch. 106a, Secs. 45-75.)

The following provision of the new statute would seem to remove all doubt that the legislature intended Section 11 to apply to the facts in this case:

> "(1) The rule that statutes in derogation of the common law are to be strictly construed shall have

no application to this act." (Hurd's Rev. Stat. of Ill. 1917, Ch. 106a, Sec. 72.)

This legislation adopted a new public policy in Illinois and this court, in *Commercial National Bank of New Orleans* v. *Canal-Louisiana Bank & Trust Company*, 239 U. S. 520, refused to apply the prior established rules of law of Louisiana as they stood before the enactment of the Uniform Law on Negotiable Warehouse Receipts, and pointed out that these new statutes could not be interpreted by prior decisions, but were, in effect, the adoption of a "new code of principles." The court said (pp. 528-9):

> "It is apparent that if these Uniform Acts are construed in the several states adopting them according to former local views upon analogous subjects, we shall miss the desired uniformity and we shall erect upon the foundation of uniform language separate legal structures as distinct as were the former varying laws. It was to prevent this result that the Uniform Warehouse Receipts Act expressly provides (Sec. 57): 'This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.' This rule of construction requires that in order to accomplish the beneficent object of unifying, so far as this is possible under our dual system, the commercial law of the country, there should be taken into consideration the fundamental purpose of the Uniform Act and that it should not be regarded merely as an offshoot of local law. * * * We think that the principle of the Uniform Act should have recognition to the exclusion of any inconsistent doctrine which may have previously obtained in any of the states enacting it."

Citation by petitioners of prior Illinois decisions are not, therefore, applicable.

Applying these rules to the new statute and the effect of Section 11, Hecht and Finn did not become general

partners of Marcuse & Company as the Court of Appeals rightly decided.

THE UNIFORM GENERAL PARTNERSHIP ACT.

At the same time that the Uniform Limited Partnership Act was passed, the Legislature of Illinois also passed a General Partnership Act, known as the "Uniform Partnership Act," covering the relations of general partners. The same underlying intention moved the legislature in passing this act as applied to the Uniform Limited Partnership Act. It contained these provisions:

> "(1) The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this act.
>
> In determining whether a partnership exists these rules shall apply:
>
> Except as provided by Section 16, *persons who are not partners as to each other are not partners as to third persons.*" (Hurd's Rev. Stat. Ill. 1917, Ch. 106a, p. 2176.)

(Section 16 deals with estoppel against one who holds himself out as a general partner, and is not applicable.)

Hecht and Finn signed an agreement to become *limited* partners with Marcuse and Morris. They did not *agree* to be general partners. They *agreed* to be limited partners only. Applying the provisions of the Uniform Partnership Act, just quoted, it clearly appears that they became *limited* and not *general* partners as to each other and, therefore, as to third persons, and the decision of the Court of Appeals is correct.

Moreover, these parties having intended to form a limited partnership fell into error as to the statute which would be in force on July 1st. But the new statute, instead of merely obliterating the old, expressly continued

it in force for some purposes. The new statute provided that a limited partnership formed under the prior statute should continue to be governed by its provisions. (Sec. 30.) The repealing clause was as follows:

> "Sec. 31. Except as affecting existing limited partnerships to the extent set forth in Section 30, the Act of 1874, is hereby repealed."

The new statute provided that "a limited partnership *is formed* when there has been substantial compliance" with its provisions and by parties who were acting in good faith, believing that they had complied with a law which protected them from liability. It is only by adopting a very strict construction of the word "formed" in the statute of 1917, and one which is destructive of its remedial purpose, that the law of 1917, and the protection which it would give to these parties, can be disregarded.

It certainly cannot be doubted that when the articles of partnership were executed and the money paid in by the partners, the partnership was "formed" for some purposes. The acts cannot be treated as wholly void and producing no result whatever. The Act of 1917 expressly stated that it should not impair the obligation of any contract "*existing when the act goes into effect,*" "nor to *affect* any * * * right accrued *before* this act took effect." (Sec. 28.) Both of these phrases include in their protection every act which had been done prior to midnight on June 30th. The contract of partnership was an "existing contract," and the rights which it created were rights which had accrued *before* the act took effect. There were then no creditors of the partnership, for it had not begun business. Their rights accrued *after* the law took effect.

The rule that the repeal of a statute shall not affect

any existing right was also made a principle of statutory construction by the law of Illinois which existed contemporaneously with the Limited Partnership Act of 1874. Section 4 of Chapter 131 of the Illinois Statutes is as follows:

> "No new law shall be construed to repeal a former law, whether such former law is expressly repealed or not as to any offense committed against the former law, or *as to any act done*, any penalty, forfeiture or punishment incurred, or *any right accrued, or claim arising under the former law*, or *in any way whatever to affect any such offense or act so committed or done*, or any penalty, forfeiture or punishment so incurred, or *any right accrued or claim arising before the new law takes effect, save only that the proceedings thereafter shall conform, so far as practicable, to the laws in force at the time of such proceeding.* If any penalty, forfeiture or punishment be mitigated by any provisions of a new law, such provision may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect. This section shall extend to all repeals, either by express words or by implication, whether the repeal is in the act making any new provision upon the same subject or in any other act."

And it seems a fair application of this statute to hold that renouncing any interest in the profits of a limited partnership, comes within the provision that "proceedings thereafter shall conform as near as may be to the laws in force at the time of such proceeding," and should give the protection which the whole character of the Act of 1917 shows to be its dominant purpose.

June 30, 1917, was Saturday. The Act of 1874 was in force during all of that day, and, therefore, the filing of the articles in the office of the county clerk at any time before midnight would have completely complied with the law. But, although the old statute was still in force, the

office of the county clerk was not open after twelve o'clock. The county clerk is not required to keep his office open on legal holidays, and Saturday afternoon is made a legal holiday by statute. The question is not as to the legal effect which this fact would have if it stood alone. For here it, in any view, serves to show the purely accidental character of the main circumstances upon which the case of the petitioning creditors rests.

On Monday morning, when the certificate was presented to him for filing, the county clerk evidently construed the law as authorizing him to receive it, and he accordingly filed it as he would have done if presented before noon on Saturday. (Rec., 364.) The whole argument of the petitioning creditors is based upon the theory that the law authorizing the filing of the certificate in the county clerk's office, was completely at an end, and, therefore, the act of filing availed nothing. But no such harsh or strict construction need be adopted, and we submit should be avoided when its consequences are so penalizing. The law contemplated that these parties should have an entire day in which to complete the formation of this partnership, and, when it closed the county clerk's office at 12:00 o'clock it withdrew from them the opportunity of having what is universally accorded, viz., an entire day for completing the transaction. It is perfectly consistent with the principles of construction, with the provisions of the general statute, and the statute of 1917 itself, to hold that the act of the county clerk in receiving the articles and filing them on Monday morning was justified by the law, and constituted a full compliance with its provisions.

If the Act of 1917 controlled this partnership, because by the terms of the certificate the business was to com-

mence on July 1st, when the new law was in force, then there was such substantial compliance with the act as to secure to the parties the benefit of its protective provisions.

The certificate, which was filed on July 2, 1917, stated in substance the facts required by Section 1 of the new law.

Section 2 of the new act provides:

> "A limited partnership is formed if there has been *substantial compliance* in good faith with the requirements of paragraph 1."

Section 11 provides that one who has contributed to the capital of the business, erroneously believing that he has become a limited partner, does not become a general partner or liable for the debts, if, on ascertaining the mistake, he renounces his interest in the profits. These sections and other provisions, all of which are directed against the personal liability of the limited partner, when construed together, show that literal compliance with each of the provisions of paragraph 1 is not essential to the formation of the firm and is not what is meant by the words: "substantial compliance in good faith." Indeed, upon any other theory it would be impossible to give any effect to Section 11. For it does not deal merely with a mistaken belief as to a certain fact, but with an erroneous belief as to the conclusion which is to be deduced from all of the facts and the law applicable to them. It covers the case by broad and inclusive language of an erroneous belief as to any of the facts, or the legal result produced by all the facts.

No Creditor Was Misled.

The law of 1917 recognizes the equitable principle that only those who have been misled shall profit by a mistake. It therefore provides that, if the certificate is false,

> "One who suffers loss by reliance on such statement may hold liable any party to the certificate who knew the statement to be false at the time he signed the certificate and learned it within a sufficient time to cancel or amend it."

In this case no creditor was misled, and no contention to the contrary has ever been made. All of the letterheads and other documents connected with the business showed that Hecht and Finn were only special partners and that the partnership was a limited one. To allow a creditor to hold them personally liable under such circumstances would be merely to give him an unexpected security for his debt, by disregarding the rule of fairness and equity which the statute says shall be the guide in the interpretation of the law.

There is no question of fraud involved. None of the petitioners, in the court below or here, assert that any of them were misled into trading with the firm of Marcuse & Company in reliance upon a belief that any of the respondents were general partners. On the contrary, all knew that the respondents were limited partners and none traded with the firm of Marcuse & Company in reliance upon any other belief than that they were limited and not general partners.

Nor was there any evidence which in the slightest degree showed knowledge or even suspicion on the part of respondents here of the asserted claim that the general partners who had control of the business and of the funds of the partnership had "squandered the funds or had

not made the investments for which the funds were intended," as intimated by counsel. (Petition, p. 20.) On the contrary, it is undisputed that none of the respondents here had the slightest intimation of any kind indicating any state of affairs with reference to the firm of Marcuse & Company, except that they were properly conducted and that the firm was making fair profits. Certified reports of auditors were submitted to the respondents at periodic intervals, and every one of these indicated an increasingly prosperous condition of the business.

III.

RESPONDENTS WERE NOT GENERAL PARTNERS AND CANNOT BE HELD AS SUCH EVEN THOUGH SECTION 11 DOES NOT APPLY.

Counsel for petitioners overlook in this connection the effect of Section 7 of the Uniform Partnership Act, which provides:

> "In determining whether a partnership exists these rules shall apply:
> (1) * * * persons who are not partners as to each other are not partners as to third persons."

It was and is conceded that none of the respondents here ever intended to become general partners. The quotation (Petition, pp. 51-52) of various provisions of the limited partnership agreement signed June 30th, does not in any sense add to the mere assertion made by the petitioners. The quoted paragraphs wherever they refer to "partners" or "partnership" refer specifically to "limited" partners and "limited" partnership, and wherever those words were used throughout that contract the words themselves, the context and the intention evidenced by all of the language indicates beyond any

doubt that it was a limited partnership and not a general partnership.

A personal right of either limited partner to the fund contributed in their names was carefully excluded.

Nothing which might become due from the partnership to Hecht or Finn was to be paid to them, but was to be paid to the Chicago Title & Trust Company as trustee, and that company was to distribute everything which it thus received among the certificate holders proportionately. The form of the certificates of interest in the trust expressly stated that they were subject to all the terms, etc., of the trust agreement; and each certificate holder, by the acceptance of the certificate, accepted the agreement and became bound in the same manner as if he had been named in and had executed the document itself.

Before any court can reach the conclusion that the respondents were general partners, it must hold that the forms of the papers and the intention of the parties not to enter into a general partnership, not to be liable for losses, and not to incur any personal liability for debts, is of no consequence. It must hold that the case is governed by the old rule that contributions to the capital of a partnership as such, and not by way of loans either to the firm or a partner, coupled with what the report of the American Bar Association describes as a "right to share in the profits and some measure of control over the business," created a liability for debts. If that old rule still existed with such vigor, and were to be enforced with such rigor, that it will transform a fair and honest commercial association like a limited partnership into a mere man-trap, then its application could not be resisted upon the ground that the parts of the transaction, if separately considered, would not constitute a

partnership, or create liability of any kind. Yet the new law itself, to whose provisions petitioners appeal to sustain their case, clearly shows that the old rule, and the theory upon which it was based, were to be abolished.

No creditor has even been misled or in any way prejudiced by anything relating to the method adopted for the formation of this partnership.

No one ever gave credit to Marcuse & Company because of the relation which these parties held toward the firm, either arising from the partnership articles as formed and published, or from the arrangement evidenced by the Hecht-Finn Trust.

No one gave credit to the firm or in any way changed his conduct because of his ignorance of the Hecht-Finn Trust and of the fact that a part of the money was contributed by others than Hecht and Finn.

No person ever believed or acted upon any intimation in dealing with Marcuse & Company that the respondents here were general partners. On the contrary, their acts, their stationery, their cards and everything connected with the conduct of their business specifically stated and evidenced to the world that Marcuse & Company was a limited partnership and not a general partnership.

No general partnership can be found in the papers executed to evidence the intention of the parties, nor is there any basis in either the Limited Partnership Act or the General Partnership Act which justifies the claim that they were general partners, either at common law, or under the Uniform General Partnership Act of 1917, as contended.

That being true, the Court of Appeals correctly decided that even if it should hold that Section 11 did not

apply, nevertheless, the respondents could not be held liable as general partners. It was entirely consistent with the Uniform Partnership Act, which makes the intention of the parties the paramount test for fixing a general partnership.

As the Court of Appeals said:

> "If experience shows the statutory test to be impracticable and unwise, the remedy is with the legislature alone. The record discloses no such situation as would suggest that the application here of that test involves hardship or inequity toward the creditors generally. It shows nothing to indicate that creditors were beguiled into extending credit to the firm on the faith that the petitioners (particularly the others than Hecht and Finn) were general partners, nor that petitioners held themselves out as such partners, or did any other of those things which, under Section 16 of the act, might entail on them general partnership liability."
>
> (Opinion Court of Appeals, Appendix, p. 21.)

RESPONDENTS, HECHT AND FINN, CLEARLY BROUGHT THEMSELVES WITHIN THE TERMS OF SECTION 11. THEIR ACT WAS SPECIFICALLY STATED AS MADE ON BEHALF OF, AND THEREFORE, NOW PROTECTS THE OTHER RESPONDENTS.

Petitioners argue (Petition, p. 40) that the respondents other than Hecht and Finn did not bring themselves within the terms of Section 11 of the Uniform Partnership Act of Illinois.

Hecht and Finn were trustees for themselves and all the other respondents under the Hecht-Finn Trust.

When Hecht and Finn, both as such trustees and individually, made the tender and paid into court the $46,000, their renunciation which accompanied the tender specifically stated that they made such tender on behalf of themselves and all of the other respondents to this

petition. The $46,000 which they thus tendered included all of the moneys which had been paid, not only to themselves, but to all of the other respondents together with interest thereon. They thereby, both by express words and by clear intention, acted for the benefit of all of the respondents. This act, the Court of Appeals held, therefore, absolved not only themselves but all of the other respondents. The renunciation stated that Hecht and Finn made the tender and renunciation "acting on behalf of themselves and each acting for himself individually and also acting as trustee under a trust individually and also acting as trustees under a trust agreement, a copy of which is deposited with the Chicago Title & Trust Company of Chicago, Illinois, and on behalf of all beneficiaries under said trust agreement," etc. (Rec., 890, 891.)

The only method whereby petitioners sought to connect the respondents other than Hecht and Finn with the partnership was through the Hecht-Finn Trust and that being true, it would seem a harsh rule which would cause said respondents a possible liability through a document and then deny them the benefit of a release under that same document. It is submitted that the Court of Appeals correctly stated the underlying principle when it said:

> "Their connection with the partnership being thus traced through their representation by Hecht and Finn, it follows that if such representation would operate to charge them, they should in good conscience also have the benefit of whatever Hecht and Finn may have done which would bring relief from the charges." (Opinion Court of Appeals, Appendix, p. 16.)

On this point the dissenting opinion points out that if Section 11 is applicable, the respondents Hecht and Finn

took the necessary action to bring themselves within its protection, even if the other respondents did not.

In conclusion it is respectfully submitted that there is no proper basis for the issuance of the writ here sought; that no justice will be served by taking this case. By no possible stretch of the imagination can it be argued that the respondents, Hecht and Finn, believed themselves to be anything other than "Limited Partners in a Limited Partnership."

In view of the admitted fact that no creditor was misled into investing with the firm under the belief that they were anything but limited partners there is no inequity in the decision sought to be reviewed; on the contrary, it is just and enforces the equities to afford which the act of July, 1917, was enacted.

The decision of the Court of Appeals is correct and the application for the writ should be denied.

Horace Kent Tenney,
Harry A. Parkin,
Attorneys for the Executors of Frank A. Hecht, Deceased.

Carl Meyer,
Henry Russell Platt,
Attorneys for Joseph M. Finn.